

April 04, 2013

GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

Signed and Filed: April 3, 2013

A handwritten signature in black ink, appearing to read "T. E. Carlson".

THOMAS E. CARLSON
U.S. Bankruptcy JudgeUNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re)	Case No: 11-31693 HLB
ROBERT A. DOSS,)	Chapter 11
Debtor.)	
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ROBERT A. DOSS,)	Adv. Proc. No. 11-3213 TC
Plaintiff,)	
vs.)	
BAC HOME LOANS SERVICING, LP,)	
Defendant.)	
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MEMORANDUM DECISION RE RULE 12(B)(6) MOTION TO DISMISS

On March 9, 2012, the court held a hearing on Defendant's Rule 12(b)(6) motion to dismiss. William H. Kiekhofner, III appeared for Defendant. Reuben L. Nocos appeared for Plaintiff. Upon due consideration, the court hereby resolves the motion as follows.

(1) The motion to dismiss Plaintiff's first claim for relief for fraud should be granted **with** leave to amend, (a) because the complaint does not allege: (i) a false representation; (ii) knowledge of its falsity; (iii) intent to defraud; (iv) justifiable reliance; and (v) damages, see Britton v. Price (In re Britton), 950 F.2d 602, 604 (9th Cir. 1991) (citations omitted), and (b)

1 because the complaint does not allege with specificity what false
2 representations were made, who made those representations, and when
3 those representations were made, see Fed. R. Civ. P. 9(b).

4 (2) The motion to dismiss Plaintiff's second claim for relief
5 for slander of title should be granted **with** leave to amend for the
6 following reasons.

7 (a) To establish a claim for slander of title, Plaintiff
8 must establish: (i) publication; (ii) falsity; (iii) absence of
9 privilege; (iv) disparagement of another's land which is relied
10 upon by a third party; and (v) direct pecuniary loss. See Smith v.
11 Commonwealth Land Title Ins. Co., 177 Cal.App.3d 625, 630 (1986)
12 (citations omitted). Statutorily required mailings, publications,
13 and delivery of notices in nonjudicial foreclosures are privileged
14 communications. See Kachlon v. Markowitz, 168 Cal.App.4th 316,
15 333-34 (2008). When the complaint makes clear that the publication
16 is one within the classes qualified as privileged, plaintiff must
17 plead that the privilege is not available as a defense because
18 defendant acted with malice. See Smith, 177 Cal.App.3d at 630-31.

19 (b) The complaint alleges that recordation of the
20 following documents slandered titled to Plaintiff's property: (i)
21 the October 20, 2009 Notice of Default (the "Notice of Default");
22 (ii) the December 15, 2009 Corporation Assignment of Deed of Trust
23 (the "2009 Assignment"); (iii) the March 17, 2010 Notice of
24 Trustee's Sale (the "March Notice of Trustee Sale"); (iv) the
25 September 22, 2010 Corporation Assignment of Deed of Trust (the
26 "2010 Assignment"); and (v) the September 22, 2010 Notice of
27 Trustee's Sale (the "September Notice of Trustee Sale").

28 (c) MERS had authority under the Deed of Trust to record

1 the 2009 Assignment and the 2010 Assignment, and courts in the
2 Ninth Circuit have repeatedly recognized that MERS, as a named
3 nominal beneficiary to a Deed of Trust, has the power to make
4 assignments under California's statutory foreclosure scheme. See
5 Lawther v. Onewest Bank, 2010 WL 4936797 * 6 (N.D. Cal. 2010).

6 (d) ReconTrust had authority under the Deed of Trust to
7 record the Notice of Default, the March Notice of Trustee Sale, and
8 the September Notice of Trustee Sale.

9 (e) The recording of the 2009 Assignment, the 2010
10 Assignment, the Notice of Default, the March Notice of Trustee
11 Sale, and the September Notice of Trustee Sale were privileged
12 communications, because they were recorded in accordance with
13 California nonjudicial foreclosure proceedings, and the complaint
14 does not allege that MERS or ReconTrust acted with malice in
15 recording these documents.

16 (3) The motion to dismiss Plaintiff's third claim for relief
17 for wrongful foreclosure should be granted **with** leave to amend for
18 the following reasons.

19 (a) California courts recognize a cause of action for
20 wrongful foreclosure under equitable principles, but full tender
21 is required to set aside a foreclosure sale based on equitable
22 principles. See Stebley v. Litton Loan Servicing, LLP, 202
23 Cal.App.4th 522, 526 (2011).

24 (b) The complaint does not allege full tender or tender
25 of all delinquencies and costs due for redemption, or that any of
26 the exceptions to the tender requirement are applicable. See Lona
27 v. Citibank, N.A., 202 Cal.App.4th 89, 112-13 (2011).

28 (4) The motion to dismiss Plaintiff's fourth claim for relief

1 for quiet title should be granted **with** leave to amend, because the
2 complaint does not allege that Plaintiff made full tender. See
3 Miller v. Provost, 26 Cal.App.4th 1703, 1707 (1994) ("a mortgagor
4 of real property cannot, without paying his debt, quiet title
5 against the mortgagee") (citations omitted).

6 (5) The motion to dismiss Plaintiff's fifth claim for relief
7 for promissory estoppel should be granted **with** leave to amend,
8 because the complaint does not allege: (a) a promise clear and
9 unambiguous in its terms; (b) reliance by Plaintiff; (c) that
10 Plaintiff's reliance was both reasonable and foreseeable; and (d)
11 that Plaintiff was injured by his reliance. See Ecology, Inc. v.
12 California, 129 Cal.App.4th 887, 901-02 (2005).

13 (6) The motion to dismiss Plaintiff's sixth claim for relief
14 for unfair business practices under Business and Professions Code
15 § 17200 et seq. (UCL) should be granted **with** leave to amend for the
16 following reasons.

17 (a) California Business and Professions Code section
18 17204 limits standing to bring a UCL claim to specified public
19 officials and a private person "who has suffered injury in fact and
20 has lost money or property **as a result** of the unfair competition".
21 (Emphasis added). The court may dismiss a UCL claim when the
22 complaint lacks sufficient allegations that plaintiff lost money or
23 property as a result of a UCL violation. See Saldate v. Wilshire
24 Credit Corp., 711 F.Supp.2d 1126, 1137 (E.D. Cal. 2010).

25 (b) The complaint alleges that Defendant engaged in
26 various "deceptive" business practices with respect to mortgage
27 loan servicing, assignments of notes and deeds of trust, and
28 foreclosure of residential property, but the complaint does not

1 allege that Plaintiff lost money or property **as a result** of these
2 alleged UCL violations.

3 (7) The motion to dismiss Plaintiff's seventh claim for relief
4 (seeking declaratory relief that the MERS system impermissibly
5 bifurcates the note from the deed of trust) should be granted
6 **without** leave to amend. See Cervantes v. Countrywide Home Loans,
7 Inc., 656 F.3d 1034 (9th Cir. 2011) (under Arizona law, designation
8 of MERS as beneficiary under deed of trust did not irreparably
9 split deed from promissory note and render mortgage unenforceable).
10 The complaint does not allege violations of California recording
11 and foreclosure statutes related to the purported splitting of the
12 note and deed of trust.

13 (8) The motion to dismiss Plaintiff's eighth claim for relief
14 for fraud should be granted **with** leave to amend, because the
15 complaint does not allege: (a) a false representation; (b)
16 knowledge of its falsity; (c) intent to defraud; (d) justifiable
17 reliance; and (e) damages. See *Britton*, 950 F.2d at 604.

END OF MEMORANDUM DECISION